

## PRETRIAL PREPARATIONS CAN IMPROVE A PHYSICIAN'S VALUE AS AN EXPERT WITNESS

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### In Brief • En bref

Many physicians appear in court as expert witnesses, but the quality of their testimony varies considerably, says a Nova Scotia judge. Pretrial preparation will improve the quality of a physician's testimony, reduce stress and save time, says Judge Timothy Daley, who provides some suggestions about how to prepare to be an expert witness and what to expect in the courtroom.

Beaucoup de médecins témoignent en cour comme experts, mais la qualité de leur témoignage varie considérablement, affirme un juge de la Nouvelle-Écosse. Une préparation avant le procès améliorera la qualité du témoignage des médecins, réduira le stress et sauvera du temps, affirme le juge Timothy Daley, qui propose des façons de se préparer à témoigner comme expert et précise à quoi il faut s'attendre en cour.

Could you be called to appear in court as an expert witness? An expert has special knowledge or skills gained through education, training or experience, and may be summoned to court during a trial to give opinion or expert evidence based on that expertise.

The rules governing the admissibility of expert testimony are the domain of the lawyer and the trial judge; the expert witness need not be familiar with the intricacies and nuances of "expert testimony" and its frequent partner, "hearsay evidence." The admissibility of expert evidence is predicated on the existence of knowledge and experience that is beyond that of the ordinary citizen and is applicable to the matter before the

court. Its purpose is to prove facts.

A substantial number of physicians appear in court as expert witnesses, but the quality of these presentations varies considerably, with two of the major reasons for poor performance being lack of preparation and unfamiliarity with legal processes. Even experts can benefit from pretrial preparation because it refreshes the level of expertise, enhances the quality of opinion, reduces stress and saves time. I am going to outline some preparations the expert witness should undertake before arriving in court, with a few suggestions for giving testimony.

### PRETRIAL PREPARATION

Generally, anyone may be summoned to testify in court as an ordinary citizen, to describe a circum-

stance seen and perhaps personally heard. The expert witness, on the other hand, has special status and may give *opinion* evidence based on expertise. The expert witness may be examined about professional credentials, depth of knowledge about the issue before the court and any opinions about cause and effect. If you are called as an expert witness, you may find the following guidelines helpful.

### ATTEND ONLY BY COURT-ORDERED SUMMONS OR SUBPOENA

The expert witness goes to court at the request of a party, or by court summons or subpoena. There are advantages to being formally ordered to attend by court order, rather than attending voluntarily, because the distinction between the two is significant.

Testifying voluntarily raises the issues of supporting the party that asked you to attend and the perceived loss of objectivity and, hence, gives the appearance of bias. A biased witness is of limited value to the court; objectivity based on sound professional principles is expected of the expert witness.

A subpoena or summons compels the witness to attend, testify and answer questions at the court's order. However, the order also per-

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mits independence and enhances the perception and probability of objectivity. It lessens the *appearance* of bias.

### **TAKE TO COURT ONLY WHAT THE SUBPOENA REQUIRES**

Read the summons or subpoena to find out what must be taken to court. If the instruction is to attend in person, that is all that is necessary. If it also requires files, documents or other materials, take only what is specified.

If you look at notes to answer a query or are given permission to read a document to aid with testimony that the court order did not require, you may be asked or required to give up the document or notes to the court or counsel, and they may then be subjected to further examination. Notes or documents prepared at the time observations were made have more value as evidence than those made later from memory.

### **CLARIFY PRECISELY THE AREA OF EXPERTISE**

Most people who are asked to testify as expert witnesses are first telephoned by counsel. Clarify why expert opinion is needed and reach an understanding with counsel about the level of expertise that is required. If the request is written, it will focus your preparation and reduce misunderstanding later.

### **DETERMINE WHETHER A WRITTEN REPORT IS REQUIRED**

Written reports form the basis for pretrial preparation, settlement negotiations and testimony during trial. They also may lead to a decision not to call the expert witness, or lead to a settlement and prevention of a trial.

Reports may be a few paragraphs long, or voluminous. If a written re-

port is requested, incorporate only what is necessary and avoid gratuitous comment. If a report requires permission, consent or a waiver of confidentiality, insist that counsel get the proper authorization. Determine any due date for the report and to whom it should be directed.

To prevent misunderstandings, request a list of questions or an outline of the issues the report should address. As a minimum, your report should identify the reasons it was prepared, the matters to be explored, your observations and rationale, and other significant information and sources. It should state any conclusions you may have reached based on the observations and information. Take a copy of the report when you testify.

### **REVIEW THE FILE AND RELEVANT INFORMATION**

You may be asked to testify any time after initial communications and written reports are submitted. Before attending court, review the specific circumstances to refresh your memory and focus on important facts and issues that will enhance the credibility of your testimony.

### **ASK FOR A CONVENIENT TIME TO ATTEND**

Trials requiring expert testimony may be time consuming. Counsel are responsible for planning and presenting their evidence, including the testimony of witnesses, and should be aware that expert witnesses have other duties. Although your request for a convenient time to appear may not be granted, you may at least make the request. Counsel also can estimate how long your court appearance may last.

### **DETERMINE WHAT PRETRIAL WORK IS REQUIRED**

Find out what pretrial proceed-

ings — such as discoveries — and what meetings with counsel will be needed and under what circumstances. Find out who will make the arrangements.

### **DETERMINE IF OTHER EXPERTS WILL TESTIFY**

Expert witnesses do not always agree on the interpretation or effects of specific circumstances or facts, and you should be prepared to respond if another expert witness challenges your opinion. Counsel must share witness lists. It may improve the quality of your evidence if the witness has some understanding of challenges from another expert and what they may entail, and is prepared to respond.

### **PREPARE A CURRENT CURRICULUM VITAE (CV)**

Opinion or expert testimony is permitted only if the court declares a witness to be an expert in a specified field. The declaration is made after the witness is sworn in and before testimony is given. Education, training, related experience and current knowledge are essential for a credible expert witness.

A declaration flows from two sources: witnesses' CVs and oral examination of their credentials. Since oral examination is time consuming, a precise, uncomplicated and simple CV made available to counsel in advance may lead to an uncontested declaration that you are an expert, and at the least it may shorten or focus oral examination. The CV should include academic training, certificates and licences, employment experiences and publications germane to the opinions that will be given as testimony. The court or counsel may ask for elaboration of your qualifications during the declaration stage of a hearing.

## DETERMINE YOUR LEGAL PROTECTION

Because professionals function under codes of ethics and rules of confidentiality, insist on a clear understanding of what protection the court may provide (and how it will be provided) for potential breaches of the Code of Ethics that may arise during testimony. Before testifying, you should obtain written confirmation from counsel outlining the protection the court provides.

## TESTIFYING AT THE TRIAL

As a prepared expert witness, you will be objective and base opinions and interpretations on sound professional knowledge. The quality of, and hence the weight given to, this testimony depends on the witness's credibility. Remember: the court requires interpretation and understanding of professional opinion. If objections are raised to your testimony, the court will instruct you whether to answer and in what manner.

## KEEP IT SIMPLE

Since the expert witness's role is to interpret and express opinions about facts, the use of plain language helps the court understand these interpretations and opinions. It will tell the court that you understand the subtleties of the profession without resorting to professional jargon. Use of jargon may lead to further questioning, resulting in confusion and, perhaps, lost credibility.

## ANSWER ONLY WHAT IS ASKED

Be precise and do not offer gratuitous comments. Answer only what you are asked, offering clarification or interpretation as necessary. It is better to acknowledge

lack of expertise in a specific area than to risk misleading responses. Failure to acknowledge a possible second interpretation may result in a loss of credibility. Do not assume that counsel or the court are familiar with the medical profession, its descriptions and prescriptions. Assume that the evidence and the manner it is presented will be assessed for validity and weighed against other evidence.

## ACCEPT THE RULES

Counsel may object to the question that has been asked or the answer that has been given. When this happens, refrain from speaking until the court instructs you. You should not attempt to justify comments unless asked to do so. Witnesses are not to respond to an objection or argue about comment or whether or not evidence should "be heard"; after an objection the court rules on it and instructs counsel how to proceed.

## WHEN IT'S OVER

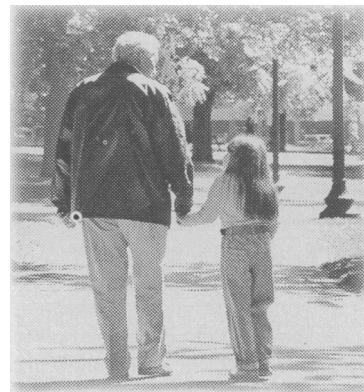
The judge permits witnesses to leave the stand by "excusing" them, which means you are free to stay in the court or leave. You may, however, be required to remain for further testimony or return as the court instructs. If the latter occurs and you have other business, you may explain this to the court and ask for another time to attend. However, the request may not be granted.

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Expert testimony is becoming increasingly common. I have tried to reduce the impact a court summons might have on physicians' primary goal: practising medicine. Pretrial preparation and focused testimony will help you accomplish that goal. ■

# He's got a pacemaker.

# She's got a grandfather.



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